UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COASTAL MARINE SERVICES, INC.	)	
	)	**CASE 21-CA-139031**
and	)	
	)	
INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS, LOCAL 5	)	

RESPONDENT COASTAL MARINE SERVICES, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46(b) of the Board's Rules and Regulations, Respondent Coastal Marine Services, Inc. (Respondent or CMSI) submits this brief in support of its exceptions to Administrative Law Judge Robert A. Giannasi's (the judge) March 1, 2016 Decision (Decision).

I. INTRODUCTION AND STATEMENT OF THE CASE

This case involves CMSI's bilateral Arbitration Agreement (Agreement) to its non-bargaining unit employees. No employee has challenged or been harmed by the Agreement, and this case has instead been instituted by the International Association of Heat & Frost Insulators and Allied Workers, Local 5 (the Union). Desperate to unionize CMSI's employees, the Union is attempting to harass and disrupt the legitimate practices and procedures of a small, family-owned business.

On October 17, 2014, the Union filed the unfair labor practice charge in this matter, which it subsequently amended on November 12, 2014, January 21, 2015, and April 10, 2015. Upon receiving the latest amended charge, the Regional Director for Region 21 issued a complaint and notice of hearing on May 28, 2015. On December 4, 2015, CMSI and counsel for the General Counsel entered into a partial stipulation of facts with exhibits, to put before the judge the sole issue of whether CMSI's Arbitration Agreement was lawful. The parties briefed the issue, and no hearing was held.

The judge issued his decision on March 1, 2016, finding, in pertinent part, as follows:

1. CMSI's enforcement of its Agreement violated Section 8(a)(1) of the Act;
2. The above violation was an unfair labor practice within the meaning of the Act;

3. The opt-out feature of the Agreement did not render the Agreement enforceable;

4. The Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. (2012), was applicable to the case at hand;

5. *D.R. Horton* remains enforceable despite being denied enforcement, in relevant part, by the Fifth Circuit; and

6. The argument that there has been no concerted activity did not change the reasoning behind the decision.

The judge, like the Board in *D.R. Horton*, *Murphy Oil*, *On Assignment Staffing Services*, and *AT&T Mobility Services, LLC*, erred because the decision evidences hostility to arbitration and contravenes the strong policy in favor of arbitration under the Federal Arbitration Act (FAA). The FAA requires that agreements to arbitrate be enforced according to their terms, even when the claims are federal statutory claims, unless the FAA's mandate has been overridden by a clear contrary congressional command.

Contrary to the Board's holdings in *D.R. Horton* and *Murphy Oil*, the right to bring a collective or class action is a procedural mechanism under state and federal rules and is not a substantive right under the NLRA. Nonetheless, assuming that Section 7 protects an employee's right to class or collective litigation of employment disputes, employees also have the right to decide whether to forego participation in such litigation in favor of arbitration.

The opt-out provision in CMSI's Agreement further validates its enforceability, as employees have the right to either engage in or refrain from participating in concerted

activity. The opt-out provision allows employees to discretely make a decision, without any employee or supervisor learning of the employee's decision.

Of further significance, there is no evidence that any concerted activities had taken place at CMSI, or that they were later thwarted by virtue of CMSI's Arbitration Agreement. The judge failed to properly address this argument.

In light of the strong national policy favoring arbitration under the FAA and the utter lack of any contrary congressional command proscribing arbitration in either the NLRA or Norris-LaGuardia Act (NLGA), CMSI respectfully urges the Board to reverse the judge's decision, reconcile itself to the circuit court precedent rejecting *D.R. Horton* and its progeny, and hold that CMSI's bilateral Agreement to resolve employment disputes through individual arbitration does not interfere with, restrain, or coerce employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

II. STATEMENT OF FACTS

CMSI began over thirty years ago as a small, family-owned and operated business offering construction subcontracting services, including insulation, decking, and lagging work. CMSI specializes in construction work on military craft, and its clientele include the United States Navy and a variety of defense contractors.

CMSI's San Diego facility is located at 2255 National Avenue. Currently, CMSI employs approximately 200 workers at different points in the year in San Diego who are working at several job sites in and around the San Diego harbor. CMSI's construction workers report for work directly to their job site, which typically includes a military or private dry dock in the San Diego harbor. CMSI's construction workers do not report to CMSI's facility for work. Instead, they visit CMSI's facility only occasionally to complete

HR paperwork or other administrative tasks. A typical CMSI employee may only report to CMSI's facility one or two times per year.

Due to, among other things, an increase in its workforce, CMSI updated its 20-year old Employee Handbook in early 2014. CMSI issued its new 2014 Employee Handbook on April 25, 2014. CMSI's 2014 Employee Handbook includes an individual agreement to arbitrate claims between the employee and CMSI. The arbitration agreement includes a waiver of the employee's right to pursue a class claim in arbitration, but allows the employee to "opt out" of the class waiver by checking a box located in the agreement. The Agreement states, in pertinent part:

> 2. I and the Company agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to my employment, including but not limited to the termination of my employment and my compensation. I and the Company each specifically waive and relinquish our respective rights to bring a claim against the other in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent me or the Company in a lawsuit against the other in a court of law. Both I and the Company agree that any claim, dispute, and/or controversy that I may have against the Company (or its owners, directors, officers, managers, employees, or agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including Section 1283.05 and all of the Act' other mandatory and permissive rights to discovery). The FAA applies to this agreement because the Company's business involves interstate commerce. For example, the Company buys and sells parts and materials across state lines. Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1961, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as may otherwise be required by state or federal law. However, nothing herein shall prevent me from filing and pursuing proceedings before the California Department

of Fair Employment and Housing, or the United States Equal Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). By this binding arbitration provision, I acknowledge and agree that both the Company and I give up our respective rights to trial by jury of any claim I or the Company may have against the other.

3. All claims brought under this binding arbitration agreement shall be brought in the individual capacity of myself or the Company. This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, or permit such claims of controversies to proceed as a class action, collective action, private attorney general action or any similar representative actions. No arbitrator shall have the authority under this agreement to order any such class or representative action. By signing this agreement, I am agreeing to waive any substantive or procedural right that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis, unless I check this box. [ ]

4. I acknowledge that this agreement is not intended to interfere with my rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations act, and that I will not be subject to disciplinary action of any kind for opposing the arbitration provisions of this Agreement.

MY SIGNATURE BELOW ATTESTS TO THE FACT THAT I HAVE READ, UNDERSTAND, AND AGREE TO BE LEGALLY BOUND TO ALL OF THE ABOVE TERMS. I FURTHER UNDERSTAND THAT THIS AGREEMENT REQUIRES ME TO ARBITRATE ANY AND ALL DISPUTES THAT ARISE OUT OF MY EMPLOYMENT,

DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGMENT AND AGREEMENT.

CMSI instituted the class waiver per a routine update of its corporate policies, including its Employee Handbook. The timing of CMSI's update coincides with an uptick in CMSI's workforce as a result of the gradual economic recovery following the "Great Recession" of 2008.

III. QUESTIONS RAISED

Whether the judge erred in finding Respondent 1) violated Section 8(a)(1) of the Act "by maintaining as a condition of employment" its Agreement; and 2) whether Respondent committed unfair labor practice charges within the Act by promulgating the Agreement.

IV. ARGUMENT AND CITATION TO AUTHORITY

A. The Judge Erred in Finding that D.R. Horton Controls this Matter [Exceptions 1-4]

The judge opined that he was "bound by Board precedent unless and until the Supreme Court or the Board directs otherwise." Decision, p. 3. However, as correctly determined by Judge Bruce D. Rosenstein in *Chesapeake Energy Corporation and its Wholly Owned Subsidiary Chesapeake Operating, Inc.*, Case No. 14-CA-100530, the United States Supreme Court has done just that with its latest arbitration-related decisions.

1. Supreme Court Precedent, Not Board Precedent, Controls this Case

The Supreme Court has consistently found that the FAA mandates that arbitration agreements are to be enforced according to their terms unless justification to override the agreement is established by a "contrary Congressional command." *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012). Moreover, the applicable Supreme Court authority confirms that this principle extends to employment-related arbitration agreements. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

With regard to matters outside of its primary jurisdiction, such as the dispute at hand, the NLRB is required to defer to other federal statutes when enforcing the NLRA.

Significantly, while the Board has broad discretion in applying the NLRA, it does not have the authority to ignore direct Congressional commands. Likewise, it cannot make up or create such commands that are not supported by legislative language. This limitation on the Board's authority has been expressly recognized by the Supreme Court:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of the Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excess emphasis upon its immediate task.

Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942); see also *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902–04 (1984) (holding that the Board's remedial authority is limited by Congressional objectives contained in the Immigration and Nationality Act). This guiding principle clearly supports a rejection of the judge's decision in this matter.

In *CompuCredit*, the Supreme Court reaffirmed longstanding precedent confirming that the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms, including provisions that waive the right to pursue class or collective action arbitration. *CompuCredit*, 132 S.Ct. at 669. The Supreme Court specifically held that the FAA establishes a liberal federal policy favoring arbitration agreements and that this policy "requires courts to enforce agreements to arbitrate according to their terms." Id. More importantly, the Court made it clear that this requirement to enforce agreements applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" Id. (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987)).

Significantly, the *CompuCredit Corp.* Court relied on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which involved an Age Discrimination in Employment Act lawsuit. Id. at 36. In *CompuCredit Corp.*, the Supreme Court made clear that its *Gilmer* decision was a continuation of the well-established federal policy under the FAA of favoring arbitrations. *CompuCredit Corp.*, 132 S.Ct. at 672 fn. 4. Given the Supreme Court's reiteration of its policy favoring arbitration and the application of this policy to an employment case, there can be no dispute that the Supreme Court intends for the FAA's federal policy favoring arbitrations to apply in the labor and employment context, and that the Board's ruling in *D.R. Horton* is not viable.[1]

The Fifth Circuit heard the direct appeal of the Board's *D.R. Horton* decision in which the judge bases his entire opinion. See *D.R. Horton v. National Labor Relations Board,* 737 F.3d 344 (5th Cir. 2013). On December 2, 2013, the Fifth Circuit denied, in pertinent part, enforcement of the Board's decision and order in *D.R. Horton*.[2] On April 16, 2014, the Fifth Circuit denied the Board's request for a rehearing en banc. The Fifth Circuit rejected the Board's three central propositions found in *D.R. Horton*: (1) that the right to pursue class or collective action litigation is a substantive right; (2) that the Board's decision does not conflict with the Supreme Court's recent precedent holding that arbitration agreements with class and collective action waivers are lawful and enforceable

[1] Tellingly, only a few years ago, the Board's own General Counsel issued "GC Memo 10-06," which determined that class action waivers did not violate the Act, so long as they did not preclude employees from collectively challenging the validity of the waiver itself (i.e., so long as they provided for alternative means of concerted action). Office of the General Counsel, Memorandum GC 10-06 (June 16, 2010). This determination was based upon the same United States Supreme Court precedent underlying the federal court decision which has expressly rejected *D.R. Horton*. Id.

[2] The Fifth Circuit enforced the Board's finding that the arbitration agreement in that case could reasonably be read as prohibiting employees from filing charges with the NLRB. The instant case does not involve that issue, because the Agreement clearly provides that it is not intended to prohibit the filing of such charges.

under the FAA; and (3) that the Section 7 right to engage in concerted activity trumps the FAA's liberal policy favoring arbitration. The Court opined:

> The issue here is narrow: do the rights of collective action embodied in this labor statute make it distinguishable from cases which hold that arbitration must be individual arbitration? *See* [*AT&T Mobility LLC v.*] *Concepcion*, 131 S.Ct. [1740] at 1750-53. We have explained the general reasoning that indicates the answer is 'no.' We add that we are loath to create a circuit split. Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable.

Id. at 362.

In fact, to date, three federal circuit courts of appeals have reviewed the Board's *D.R Horton* decision, and all three have rejected its substantive analysis. In *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-1055 (8th Cir. 2013), the Eighth Circuit Court of Appeals declined to follow *D.R. Horton*, citing the Supreme Court's holding in *CompuCredit Corp*. and reasoning that such a command invalidating class action waivers does not exist in relation to the NLRA. Similarly, in a per curiam decision, the Ninth Circuit Court of Appeals found that "*D. R. Horton* . . . conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the [FAA] . . . . [T]he Supreme Court recently reiterated that courts must vigorously enforce arbitration agreements according to their terms . . . unless the FAA's mandate has been overridden by a contrary congressional command . . . . Congress, however, did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act." *Richards v. Ernst &Young*, 734 F.3d 871, 873–74 (9th Cir. 2013) (internal quotations and citations omitted).

These decisions[3] are consistent with the decisions of countless other courts that have considered the matter. See, e.g., *Nanavati v. Adecco USA, Inc.*, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015); *Patterson v. Raymours Furniture Co., Inc.*, 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Brown v. Citicorp Credit Servs., Inc.*, 2015 WL 1401604 (D. Idaho Mar. 25, 2015); *Martinez v. Leslie's Poolmart, Inc.*, 2014 WL 5604974 (C.D. Cal. Nov. 3, 2014); *Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240 (C.D. Cal. Oct. 7, 2014); *Ortiz v. Hobby Lobby Stores Inc.*, 52 F. Supp. 3d 1070 (E.D. Cal. 2014); *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014); *Longnecker v. American Exp. Co.*, 23 F. Supp. 3d 1099 (D. Ariz. May 28, 2014); *Cohn v. Ritz Trans., Inc.*, 2014 WL 1577295 (D. Nev. Apr. 17, 2014); *Appelbaum v. AutoNation Inc.*, 2014 WL 1396585 (C.D. Cal. Apr. 8, 2014); *Green v. Zachry Indus., Inc.*, 36 F.Supp.3d 669 (W.D. Va. Mar. 25, 2014); *Hickey v. Brinker Int'l Payroll Co, L.P.*, 2014 WL 622883 (D. Colo. Feb. 18, 2014); *Zabelny v. CashCall, Inc.*, 2014 WL 67638 (D. Nev. Jan. 8, 2014); *Siy v. CashCall, Inc.*, 2014 WL 37879 (D. Nev. Jan. 6, 2014); *Knight v. Rent-A-Center East, Inc.*, 2013 WL 6826963 (D.S.C. Dec. 23, 2013); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.,* 2013 WL 6158040 (N.D. Cal. Nov. 22, 2013); *Smith v. BT Conferencing, Inc.*, 2013 WL 5937313 (S.D. Ohio Nov. 5, 2013); *Sylvester v. Wintrust Fin. Corp.*, 2013 WL 5433593 (N.D. Ill. Sept. 30, 2013); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588 (S.D.N.Y. Sept. 9, 2013); *Morris v. Ernst & Young, LLP*, 2013 WL 3460052 (N.D. Cal. July 9, 2013); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 WL 3233211 (C.D. Cal. June 25, 2013); *Dixon v. NBC Universal Media, LLC*, 947 F.Supp.2d 390 (S.D.N.Y. 2013); *Birdsong v. AT&T Corp.*, 2013 WL 1120783 (N.D. Cal. Mar. 18, 2013); *Ryan v. JPMorgan Chase &*

[3] The Second Circuit Court of Appeals has also signaled a refusal to follow *D.R. Horton*. See *Sutherland v. Ernst &Young, LLP*, Case No. 12-304, * 11 fn. 8 (2nd Cir. Aug. 9, 2013).

Co., 924 F.Supp.2d 559 (S.D.N.Y. 2013); *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 WL 499210 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013); *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp. 2d 368 (E.D.N.Y. 2013); *Long v. BDP Int'l, Inc.*, 919 F.Supp.2d 832 (S.D. Tex. 2013); *Cohen v. UBS Fin. Servs., Inc.*, 2012 WL 6041634 (S.D.N.Y. Dec. 3, 2012); *Andrus v. D.R. Horton, Inc.*, 2012 WL 5989646 (D. Nev. Nov. 5, 2012); *Johnson v. TruGreen Limited P'ship*, Case No. 1:12cv00166 (W.D. Tex. Oct. 25, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); *Cilluffo v. Central Refrigerated Servs., Inc.*, 2012 WL 8523507 (C.D. Cal. Sept. 24, 2012); *Jones v. JGC Dallas LLC*, 2012 WL 4119994 (N.D. Tex. Aug. 17, 2012); *Tenet HealthSystem Philadelphia, Inc. v. Rooney*, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Security Servs. USA, Inc.*, 883 F. Supp.2d 784 (E.D. Ark. 2012); *Luchini v. Carmax, Inc.*, 2012 WL 2995483 (E.D. Cal. July 23, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157 (D. Kan. July 2, 2012); *De Oliveira v. Citicorp N. Am., Inc.*, 2012 WL 1831230 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, 2012 WL 3140299 (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp.2d 831 (N.D. Cal. 2012); *Brown v. Trueblue, Inc.*, 2012 WL 1268644 (M.D. Pa. April 16, 2012); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp.2d 1038 (N.D. Cal. 2012); *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012); *LaVoice v. UBS Fin. Servs.*, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. June 23, 2014).

Further bolstering the argument that the Board's decisions in *D.R. Horton* and *AT&T Mobility Services, LLC*, 363 NLRB No. 99, slip op. (2016), are in direct defiance of

the United States Supreme Court's rulings regarding arbitration agreements, the California Supreme Court has specifically ruled that class action waivers in employment arbitration agreements are enforceable, agreeing with the Fifth Circuit's reasoning in *D.R. Horton*. See *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 141 (Cal. 2014) ("Thus, if the Board's rule is not precluded by the FAA, it must be because the NLRA conflicts with and takes precedence over the FAA with respect to the enforceability of class action waivers in employment arbitration agreements. As the Fifth Circuit explained, neither the NLRA's text nor its legislative history contains a congressional command prohibiting such waivers."). California's persuasive decision perfectly illustrates the Board's lack of jurisdiction to create new laws regarding arbitration agreements and class action waivers as they have already been addressed by several federal courts and the United States Supreme Court.

Despite the clear and concise analysis established by the Supreme Court's post-*D.R. Horton* decisions, the judge in the matter at hand improperly ignored the precedential value of the Supreme Court cases and instead relied upon flawed logic to avoid the application of the controlling authority. Significantly, the judge erroneously failed to undertake any analysis of the Act's statutory language to determine if there existed any "contrary Congressional command," instead relying upon the Board's recent decision in *AT&T Mobility Services, LLC*, 363 NLRB No. 99, slip op. The judge's reliance on a decision is that is currently pending before the Fourth Circuit is faulty, as the case is not final, and the Board's order therefore has not yet been enforced. This reliance is also particularly troubling, given that the Board seems to have no intention of providing the

Supreme Court the opportunity to specifically address its *D.R. Horton* decision by appealing adverse decisions issued by the Federal Courts of Appeals.

2. The Board Should Accept the Fifth Circuit's Decision Because It Involves an Accommodation of the NLRA to the FAA and Other Federal Statutes.

Although the Board generally does not acquiesce to circuit court decisions that conflict with the Board's interpretation of the NLRA, that policy of non-acquiescence is not applicable here. See, e.g., *Northcrest Nursing Home*, 313 NLRB 491, 496 (1993); *Arvin Industries*, 285 NLRB 753, 757 (1987). In overturning the Board's decision in *D.R. Horton* the Fifth Circuit did not quibble with the Board's interpretation of the NLRA. *D.R. Horton*, 737 F.3d at 362 ("We do not deny the force of the Board's efforts to distinguish the NLRA from all other statutes that have been found to give way to requirements of arbitration."). Rather, the Fifth Circuit took issue with the Board's attempts to interpret the FAA and the Norris-LaGuardia Act, two statutes outside the Board's "interpretive ambit." Id. at fn.10 (rejecting Board's interpretation of the Norris-LaGuardia Act and holding it "undisputed" that the Norris-LaGuardia Act "is outside the Board's interpretive ambit").

It is well-established that the Board is not entitled to deference when it interprets other statutes or accommodates them to the NLRA. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."). The Board itself has acknowledged that it must be mindful of "any conflicts between the terms or policies of the Act and those of other federal statutes," and that when there is a conflict between the policies of the NLRA and another federal statute, the Board must undertake a "careful accommodation" of the

two statutes. *D.R. Horton*, 357 NLRB slip op. at 8 (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)); see also *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) ("[L]abor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress.") (footnote omitted); *Int'l Harvester Co.*, 138 NLRB 923, 927 (1962), aff'd, *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964) (citing *Southern Steamship*: "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

Because the Fifth Circuit's decision involves an accommodation of the NLRA to other federal statutes, the Board should defer to the Fifth Circuit's decision and reverse the judge's order and decision.

3. The Board Should Reconsider and Reverse Its Position in *D.R. Horton.*

The Board should reverse its position in *D.R. Horton* because it fails to properly accommodate the NLRA to the FAA. The Supreme Court has made clear that arbitration agreements with class/collective-action waivers are enforceable under the FAA, unless another statute contains a congressional command to the contrary. As the Fifth Circuit held, the NLRA contains no such command. The Board's decision in *D.R. Horton* also rests on a flawed interpretation of the Norris-LaGuardia Act, a statute that the Board has no authority to interpret or enforce.

(a) The NLRA must yield to the FAA and the strong federal policy favoring arbitration of employment disputes.

The Board in *D.R. Horton* failed to give appropriate deference to the FAA and the strong federal policy favoring arbitration of employment disputes. The Board

acknowledged that when there is a conflict between the policies of the NLRA and another federal statute, such as the FAA, the Board must undertake a "careful accommodation" of the two statutes. *D.R. Horton*, 357 NLRB No. 184 slip. op. at 8 (citing *Southern Steamship*, 316 U.S. at 47).

In the case of the FAA, the Supreme Court has made it abundantly clear how the FAA and another federal statute are to be accommodated. The FAA requires enforcement of arbitration agreements according to their terms unless the NLRA contains a clear "congressional command" to the contrary. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)); *D.R. Horton*, 737 F.3d at 360. Despite the absence of any such command in the NLRA, the Board found that, to the extent the FAA conflicts with the NLRA, "the FAA would have to yield." *D.R. Horton*, 357 NLRB No. 184, slip. op. at 12. Thus, *D.R. Horton* clearly conflicts with the Supreme Court's unequivocal directive that arbitration agreements should be enforced under the FAA in the absence of clear statutory language requiring the FAA to yield.

The FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Enacted in 1925 to combat the "judicial hostility to arbitration agreements," the FAA "place[s] arbitration agreements upon the same footing as other contracts," and incorporate[s] a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. 20, 24-25 (1991) (citations omitted).

The courts interpreting the FAA, including the U.S. Supreme Court, have concluded that arbitration agreements are to be enforced under the FAA "even if the

arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." Id. at 32 (internal citations omitted). The Supreme Court reiterated in *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 131 S. Ct. 1740; and *CompuCredit Corp*, 132 S. Ct. at 669, that the FAA *requires* courts to enforce arbitration agreements according to their terms unless there is a clear congressional intent to override that mandate. That mandate is essential to preserving the strong federal policy favoring arbitration; a policy which is difficult to overstate.

Here, nothing in the NLRA's text or legislative history suggests that Congress intended to ban a class action waiver in an arbitration agreement. Section 7 provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. If language actually touching upon the adjudication of legal claims does not evince a sufficiently clear congressional command to override the FAA, it surely follows that the NLRA's more ambiguous definition of "concerted activities" for the "mutual aid or protection" of employees is insufficient. If Congress had intended to engraft onto every employment statute a right to collective litigation, it could and "would have done so in a manner less obtuse." *CompuCredit*, 132 S.Ct. at 672.

Section 7 says nothing about arbitration, federal court jurisdiction, the right to particular procedural options to resolve legal claims, or *anything* else about what goes on during judicial proceedings. *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 790 (E.D. Ark. 2012) ("The NLRA's text contains no command that is contrary to

enforcing the FAA's mandate."); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) ("[C]ongress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act[.]"); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1047 (N.D. Cal. 2012) ("[T]here is no language in the NLRA... demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA."). When a statute "is silent on whether claims under [it] can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms." *CompuCredit*, 132 S. Ct. at 673.

Moreover, there is nothing in the legislative history of the NLRA to suggest antipathy toward individual arbitration. Section 1 of the NLRA declares that it is the policy of the United States to protect union organizing and collective bargaining "for the purpose of negotiating the terms and conditions of . . . employment." 29 U.S.C. §151; see also *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) (the NLRA "is concerned with the disruption to commerce that arises from interference with the organization and *collective-bargaining rights* of workers . . ." (emphasis added)); *D.R. Horton*, 737 F.3d at 361 ("Neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA."). Nor does the legislative history of Section 7 have anything specific to say about employees' use of a particular procedural device to adjudicate a claim under an *unrelated*, *non-NLRA* statute. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013).

In sum, the NLRA's text and legislative history do not contain any indication that Congress intended to override the FAA's mandate to enforce arbitration agreements

according to their terms. At the very least, Congress did not do so with the "clarity" required for the NLRA to override the FAA. *CompuCredit*, 132 S. Ct. at 672

(b) The Board has no statutory authority to interpret the NLGA, and even if it did, the NLGA does not prohibit enforcement of arbitration agreements that include class/collective action waivers.

The Board in *D.R. Horton* also erred in holding that the NLGA and by implication the NLRA, partially repealed the FAA so that it does not apply to employment arbitration agreements containing class/collective action waivers. Id. at 5-6, 12. The Board noted the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D.R. Horton*, 357 NLRB No. 184, slip op. at 12. Therefore, if the FAA conflicts with either of those statutes, the Board in D.R. Horton reasoned that the FAA must have been repealed, either by the NLGA's provision repealing statutes in conflict with it or impliedly by the NLRA. Id.

The Board, however, failed to account for the dates when the NLRA and FAA were amended or reenacted. Those are the relevant dates for this analysis. See *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 fn.18 (1971) (looking to reenactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail). Congress reenacted the FAA in 1947, "twelve years after the NLRA and fifteen years after the passage of the Norris-LaGuardia Act." *Owen*, 702 F.3d at 1053. Thus, in any conflict between these statutes, the FAA must prevail. "The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes." Id.

In any event, the Board's reading of the NLGA is unreasonable and beyond the scope of its jurisdiction. The NLGA is an anti-injunction statute. It deprives courts of

authority to issue injunctions in labor disputes, except under certain specific exceptions. *D.R. Horton* was not an injunction proceeding and the NLGA has nothing to do with whether employees have an unwaivable Section 7 right to adjudicate class or collective action claims in court. Further, the NLGA can only be enforced by courts. The statute provides that "[n]o restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction[.]" 29 U.S.C. § 109. The NLGA specifically defines those contracts to which it applies (colloquially known as "yellow-dog" contracts) as limited to contracts not to join a union or to quit employment if one becomes a member of a union. NLGA § 3(a), (b), 29 U.S.C. § 103(a), (b). See also *Barrow Utils. & Elec*. *Co-op*, 308 NLRB 4, 11 n.5 (1992) (defining a yellow dog contract as "[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others . . .").

D.R. Horton's characterization of the "right" to engage in class and collective legal actions as "the core substantive right protected by the NLRA" and "the foundation on which the Act and Federal labor policy rest," *D.R. Horton*, 357 NLRB No. 184, slip op. at 10, makes no sense given that when the original Wagner Act was passed in 1935, Rule 23, the FLSA, Title VII, the ADEA, and the many other statutes that give rise to modern employment law class and collective actions did not exist.

Moreover, the Supreme Court has found that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike

obligation under a collective bargaining agreement when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. Id. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. Id. at 252.

The federal courts have, in several cases, rejected *D.R. Horton*'s analysis of the history of the NLGA, NLRA, and FAA. These two statutory frameworks, over which the courts and not the Board have expertise[4] do not even overlap, much less conflict. *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014) (enforcing individual agreement to arbitrate agreed to via employer's opt out arbitration program because it did not violate NLGA). The NLGA does not even relate to FAA-protected arbitration agreements, let alone reflect an "express congressional command" so as to override them. In *On Assignment*, the Board ignored these straightforward and logical conclusions by contorting the NLGA's function and purpose to arrive at the opposite conclusion. Failing to address the NLGA's purpose or historic application, the Board first cites Section 103's prohibition of any "undertaking or promise . . . in conflict with the public policy declared" in the NLGA. 362 NLRB No. 189, slip op. at 7. It then recites the NLGA's policy, in Sections 102 and 103, of "insuring that the individual unorganized worker is free from the interference, restraint, or coercion of employers in concerted activities for the purpose of mutual aid or protection," including "aiding any person participating or

[4] See *On Assignment Staffing*, slip op. at 16 (Member Johnson, Dissenting) (citing *Patterson v. Raymours Furniture Co.*, 2015 U.S. Dist. LEXIS 40162 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, 2015 U.S. Dist. LEXIS 85113 (N.D. Cal. June 30, 2015); *Hobson v. Murphy Oil, USA, Inc.*, 2015 U.S. Dist. LEXIS 88241 (N.D. Ala. July 8, 2015)).

interested in any labor dispute who is prosecuting any action or suit in any court of the United States or any state." Id. at 7-8 (internal quotes omitted).

From this language, the Board leaps to the unsupported conclusion that the NLGA's plain language constitutes the "clear congressional command" required to overcome the FAA's mandate that arbitration agreements be enforced according to their terms, asserting "[f]ederal labor law and policy thus prohibit agreements in which employees prospectively waive their right to engage in concerted activity for mutual aid or protection." Id. at 8. But the Board's conclusion does not automatically result in the express invalidation of arbitration agreements sufficient to establish a "clear congressional command" necessary to overcome the mandates of the FAA. To the contrary, it is only if "concerted activity for mutual aid or protection" is interpreted to include all class and collective litigation that the mandates of the FAA can even be implicated under the NLGA. The NLGA itself makes no mention of class or collective litigation procedures or arbitration agreements. Moreover, and as discussed above, the Board's interpretation of the NLGA to encompass all class and collective litigation is erroneous because such litigation often does not constitute protected concerted activity for mutual aid or protection. Thus, the NLGA contains no congressional command against enforcement of individual arbitration agreements.

For all of these reasons, *D.R. Horton* is wrongly decided, and its subsequent decision in *On Assignment Staffing* is therefore nonbinding. *D.R. Horton* far exceeds the Board's authority and administrative expertise under the NLRA and has been rejected by virtually every court that has considered it.

B. The Judge Erred in Concluding that Section 7 Provides the Right to Pursue Class or Collective Action Litigation. [Exception 5]

Throughout his decision, the judge erroneously concludes that Section 7 provides employees the substantive right to collectively file class action lawsuits or arbitrations (Decision pp. 3-4), reasoning that because the Board's *D.R. Horton* decision held the same. Because this conclusion is not supported by the Act's language, this portion of the judge's decision should not be adopted.

As a preliminary matter, Section 7 rights are not absolute. In *D.R. Horton*, the Board failed to recognize that Section 7 rights fall on a continuum and, at some point, must be balanced against other statutory and common law rights. See *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (stating that whether Section 7 rights must give way to other legal rights, such as property rights, "largely depend[s] upon the content and the context of the [Section] 7 rights being asserted."); *Hoffman Plastic*, 535 U.S. at 144 ("we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"). Because the Section 7 rights found in *D.R. Horton* are far from the core rights protected by the NLRA, they must yield to the FAA's clear mandate. The continuum of Section 7 rights becomes weaker the farther the purported activity falls from the NLRA's core concerns, to wit, organizing and collective bargaining.

In addition, the *D.R. Horton* decision is premised in large part upon its finding that the Act provides employees an unwaivable substantive right to collective litigation. However, the authority to prosecute class actions is not provided by the NLRA, but rather by Federal Rule of Civil Procedure 23 and the collective action procedures of substantive labor laws. F.R.C.P. Rule 23; see e.g., 29 U.S.C. § 216(b) (availability of class action

procedures for alleged violations of Federal Labor Standards Act). The United States Supreme Court has expressly determined that the ability to seek class actions pursuant to these federal laws "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980). The Court has further held that the right to exercise such class procedures is in fact waivable. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). In other words, contrary to *D.R. Horton*, the right to bring class actions is not an unwaivable, substantive right, but rather an optional procedural vehicle. Indeed, the Board in *D.R. Horton* acknowledged that "there is no Section 7 right to class certification." *D.R. Horton*, 357 NLRB No. 184, slip op. at 10. When a class or collective action is filed, the employees still must prove all of the requirements for class certification and employers are "free to assert any and all arguments against certification." Id. at fn.24. The only Section 7 right found by the Board in *D.R. Horton* is the "opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law." Id.

Further, *D.R. Horton* mistakenly equates the rights to discuss employment claims with other employees, to pool resources to hire an attorney, and to seek advice and litigation support from a union – rights and activities that can be protected by Section 7 depending on the circumstances – as legally equivalent to having a single forum adjudicate common legal claims under other statutes and rules of civil procedure. 357 NLRB No. 184, slip op. at 6. Even if the activities mentioned above leading up to the filing of a claim in court are considered protected by Section 7, it does not follow that Section

7 dictates *the process* by which the employees' claims are ultimately adjudicated, whether in a single or collective forum.

Whether an employment law claim is litigated on a class or collective basis has nothing to do with organizing or bargaining collectively under the NLRA. Thus, the Section 7 right identified in *D.R. Horton* falls on the dimmest end of the spectrum, if even on the spectrum at all. Courts that have considered, and rejected, *D.R. Horton* have reached this very conclusion. See, e.g., *Nelsen v. Legacy Partners Residential, Inc*., 144 Cal. Rptr. 3d 198, 213 (Cal. Ct. App. 2012) ("[The Board] cites no clear precedent for its holdings that 'an individual who files a class . . . action regarding wages, hours or working conditions' is per se 'engaged in conduct protected by section 7 . . .") For this reason, arbitration agreements with class/collection action waivers for non-NLRA claims do not constitute agreements that "purport to restrict Section 7 rights" as the Board found in *D.R. Horton*. 357 NLRB No. 184, slip op. at 4.

There is no evidence that the Agreement at issue here has *anything* to do with the right to organize and bargain collectively under the NLRA. Instead, it is an agreement designed to resolve *non*-NLRA claims efficiently through arbitration. Congress has not given the Board the power to police employment agreements that have nothing to do with the right to organize or bargain collectively under the Act, especially when balanced against other specific federal laws regulating such agreements, like the FAA.

There was no finding in this case or in *D. R Horton* that an agreement to arbitrate non-NLRA claims on an individual basis would have a "probable consequence" of thwarting union organizing or interfering with the collective bargaining process. There is no evidence that the Agreement was negotiated through a company-dominated union or

as part of an effort to defeat a strike or union-organizing campaign. The Agreement is designed, instead, to resolve claims arising under other federal and state laws, which have their own regulatory and enforcement mechanisms, including class enforcement. Simply put, the Board is not the appropriate adjudicator of whether employees can waive a procedural right created by procedural rules and statutes that the Board otherwise has no jurisdiction to enforce.

The Agreement does not contain any threat of "coercion, restraint or interference" if an employee or group of employees files a class or collective action in court. This distinguishes the Agreement from the cases cited in *D.R. Horton*, which involve situations in which employees are *disciplined or discharged* merely for asserting common legal claims or jointly selecting a common representative to present such claims to their employer. See *D.R. Horton*, 357 NLRB No. 184, slip op. 2.

Courts that have considered *D.R. Horton* have rejected the proposition that the NLRA creates a non-waivable right to adjudicate, in a single forum, common claims arising under other laws and rules of civil procedure. After all, the Board has no expertise in the process or rules by which individual claimants may seek to have one court address their claims at the same time. See, e.g., *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 213 (Ct. App. 2012) ("[T]he interplay of class action litigation, the FAA, and section 7 of the NLRA - falls well outside the Board's core expertise in collective bargaining and unfair labor practices.").

The Board must recognize that the Supreme Court has repeatedly deemed a class or collective action as principally a procedural, and therefore waivable, option rather than a substantive right protected by the NLRA or any other law. The Supreme Court reiterated

in *Italian Colors* that Federal Rule of Civil Procedure 23, which governs class actions, "was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Italian Colors*, 133 S. Ct. at 2309. Most importantly, *Gilmer* itself found that a class or collective action procedure is not a guaranteed right, but rather a waivable option. *Gilmer*, 500 U.S. 20, 32 (1991) (arbitration agreement should be enforced "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator"). The Supreme Court reiterated this holding in *Italian Colors*. 133 S. Ct. at 2312.

Consequently, an arbitration procedure like CMSI's Agreement which, seeks only to regulate how a claim will be litigated or arbitrated, does not implicate the NLRA because it fully permits the employee to pursue their litigation "without employer coercion, restraint or interference." *D.R. Horton*, 357 NLRB No. 184, slip op. at 10 n.24. Employees retain the ability to join together to discuss and present their claim, as a group, in court. Whether a court decides to compel individual arbitration of that claim is a matter for the court to decide under the rules of civil procedure, the FAA, and the substantive law governing the claim at issue – not the NLRA, which does not regulate how the case is litigated or arbitrated.

C. The Board's Recent Decision in *On Assignment Staffing* to Expand the *D.R. Horton* Doctrine to Cover Voluntary Arbitration Agreements is Erroneous and Does Not Support the Judge's Decision. [Exceptions 3, 5, 7, 8, 9]

The judge found that the opt-out feature in the Agreement did not have an impact on whether the Agreement violates employees' rights under Section 7, vaguely referring to the Board's recent decision in *AT&T Mobility Services,* LLC, 363 NLRB No. 99 (2016) as its sole reasoning. In *AT&T*, the Board found that AT&T's arbitration agreement was

still considered a mandatory agreement, despite the employees having 2 full months to opt out. The Board based all of its reasoning on its recent case *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), holding that, regardless of the protections afforded to employees by being able to opt-out of an arbitration agreement, the act of requiring employees to opt-out of a class action waiver is in and of itself a violation. *AT&T*, at *1.

However, in this case, CMSI's agreement allows employees to communicate the opt-out decision simply by checking a box. Nothing requires employees to have any direct communication with their supervisor or member of CMSI management, as the form is kept with Human Resources. The arbitration agreement at issue in *On Assignment* limited resolution of all employment-related claims to individual arbitration, unless employees opted out of the agreement before it took effect 10 days after receiving it. The Board found such a voluntary "opt-out agreement" unlawful on two separate grounds: (1) that the arbitration agreement constituted a "mandatory condition of employment," notwithstanding that employees had the right to opt out of coverage, and (2) that the agreements are unlawful as a matter of law because they require employees to prospectively waive their Section 7 rights to engage in concerted activity. *On Assignment* is not only logically and legally flawed, but factually distinguishable, and thus provides no support for the judge's Decision in this case.

Like *D.R. Horton* and *Murphy Oil*, *On Assignment* is founded upon the erroneous premise that Section 7 creates a substantive right to engage in class and collective litigation and that the FAA therefore does not apply – foundational arguments the Supreme Court and Circuit Courts of Appeal have now squarely refuted. Because the

central holding in those cases is invalid, *On Assignment* is wrong for all of the reasons set forth in Argument B, *supra*.

As discussed more fully above, even before the Board decided *On Assignment*, in a case the Board did not reference in its decision, the Ninth Circuit in *Johnmohammadi,* supra, enforced a voluntary, opt-out arbitration agreement with a class action waiver and rejected the employee's claim that the agreement violated the NLRA by interfering with or restraining the employee in the exercise of her right to file a class action under the FLSA.[5] In doing so, the Ninth Circuit directly rejected the Board's premise in *On Assignment* that an agreement offered on an opt-out basis was a mandatory condition of employment. The Ninth Circuit instead correctly held that under the opt-out process, the employee was free to exercise her right to choose not to litigate, including on a class or collective basis. Id. at 1075–76. *On Assignment*, and therefore *AT&T Mobility* are both wrongly decided and inapplicable to this case and thus provides no support for the judge's decision.

Further, these cases are pending before their respective courts of appeal, and therefore should not be considered binding upon CMSI. In fact, the General Counsel continues to request from the circuit courts that *On Assignment* be held in abeyance, pending any further review by the Fifth Circuit en banc. The General Counsel cannot expect to enjoy the benefit of having its cases held in abeyance which are clearly going to be decided adversely to the General Counsel's arguments, but then have the Board

[5] Notably, class actions under Federal Rule of Procedure 23 use an opt-out process, and collective actions brought under the FLSA specifically have an opt-in process in which the employees must affirmatively opt-in to the collective action. However, these processes have never been challenged as impairing concerted activities.

cite to these cases while they have not been fully decided, let alone been enforced by an appellate court.

D. The Judge's Decision Lacked the Presence Of Any Authority That Concerted Activity Is Unnecessary [Exception 6]

The judge dismissed CMSI's argument that because no concerted activity has taken place, the Agreement is valid, again indolently referring to the Board's decision in *AT&T Mobility Services.* However, the footnote the judge cites, as well as the entire decision in *AT&*T does not address CMSI's argument that concerted activity must have occurred.

Section 7 of the Act protects concerted activity such that an employee must act "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rockwell Intern. Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987); *Super Market Serv. Corp. v. Heller*, 227 NLRB 1919, 1927 (1977) (finding no concerted activity based in part on fact that co-employees mentioned in the letter had "no part in writing the letter, no notice when it was to be written [and] no opportunity to make suggestions as to its contents . . . ."). See *also E.I. Du Pont De Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir. 1983) ("The requirement of 'concert' denies protection to activity that, even if taken in pursuit of goals that would meet the test of 'mutual aid or protection,' is only the isolated conduct of a single employee.").

In *Meyers Indus.*, 281 NLRB 882, 885 (1986), the Board made it clear that to constitute "concerted activity," the employee must have engaged in the activity "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885 (1986) (emphasis added). This was reinforced in *Whittaker Corp.*, 289 NLRB 933 (1988), wherein the Board again recognized

that the mere individual assertion of a matter "of common concern" to other employees is not concerted action.

Relevant here is that a charging party's mere filing of a complaint, either with an employer or in court, is not protected by Section 7 absent the employee working in concert with other employees for their mutual aid or protection or seeking to initiate, induce, or prepare for such group action. *K-Mart Corp.*, 341 NLRB 702 (2004). There is no class action civil litigation pending. There is nothing in the record to indicate that that any employees were denied the ability to speak with other employees about signing the arbitration agreement, nor that anyone has spoken with others about suing Respondent. These facts are fatal to the complaint. *Meyers II,* 281 NLRB at 887 ("We reiterate, our definition of concerted activity in *Meyers I* encompasses...individual employees bringing truly group complaints to the attention of management.").

The judge did not even take the time to provide legal support for all of his findings. Because the judge does not appear to have seriously considered CMSI's argument, the decision must be reversed.

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V. CONCLUSION

As set forth above, the judge based its decision upon *D.R. Horton*; but the Board's decision is not valid in light of Supreme Court Precedent. In the alternative, the Board should revisit and revise its erroneous holding in *D.R. Horton*. The Agreement's opt-out device further advances the argument that the Agreement did not unlawfully restrict employees' rights under Section 7 of the Act. Accordingly, the judge's findings and conclusions are without merit and must be reversed.

Respectfully submitted this 29th day of March, 2016.

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COASTAL MARINE SERVICES, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COASTAL MARINE SERVICES, INC.	)	
	)	**CASE 21-CA-139031**
and	)	
	)	
INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS, LOCAL 5	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2016, I e-filed Respondent Coastal Marine Services, Inc.'s Brief in Support of Exceptions to the Decision of the Administrative Law Judge, and immediately thereafter served it by electronic mail upon the following:

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